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IN THE

# Supreme Court of the United States

NATHAN HAUSMAN, JOSEPH APPLEBAUM, THE APPLEBAUM FOUNDATION, INC., ALFRED N. BARNETT, JULIE A. BUCKLEY, as remaining trustee u/w of Daniel Buckley, deceased, PETER FUNDARO, HAROLD MALTZ, NORVIN H. RIESER, FRED WEIBERT and REGINA WEIBERT and L. H. LUCKETT, in their own behalf as stockholders of Pantepec Oil Company, C.A., and in behalf of all other such stockholders similarly situated,

*Petitioners,*

—against—

JOHN W. BUCKLEY, THE CATAWBA CORPORATION and PANTEPEC OIL COMPANY, C.A.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statement of the Case | 4 |
| Reasons for Granting the Writ | 9 |
| Conclusion | 19 |
| Appendix A—Opinion | 21 |
| Appendix B—Judgment | 42 |


### CITATIONS

CASES:


*Ackert* v. *Ausman*, 29 Misc. 2d 974, 218 N. Y. S. 2d 814 (Sup. Ct. N. Y. Co. 1961) ..... 17

*Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 2d 99 (1954) ..... 8, 11, 12, 15, 18

*Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1955) 14

*Bing* v. *Thunig*, 2 N. Y. 2d 656, 143 N. E. 2d 3 (1957) 17

*Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) ..... 2, 12, 18

*Frank* v. *American Commercial Alcohol Corp.*, 152 Misc. 123, 273 N. Y. S. 622 (Sup. Ct. N. Y. Co. 1934) 17

PAGE

*Goldstein* v. *Lightner*, 266 App. Div. 357, 42 N. Y. S. 2d 338 (1st Dept. 1943), aff'd 222 N. Y. 670, 56 N. E. 2d 98 (1944) ..... 16

*Gottesman* v. *General Motors Corp.*, 268 F. 2d 194 (2 Cir. 1959) ..... 10

*In re Hawley's Will*, 6 Misc. 2d 927, 163 N. Y. S. 2d 701 (Surr. Ct. Kings Co. 1957) ..... 11

*Hilton* v. *Guyot*, 159 U. S. 113 (1895) ..... 19

*Hirshhorn* v. *Hirshhorn*, 280 App. Div. 791, 112 N. Y. S. 2d 841 (2d Dept. 1952) ..... 10

*Huber Baking Co.* v. *Stroehmann Bros. Co.*, 252 F. 2d 945 (2 Cir. 1958), cert. den. 358 U. S. 829 ..... 15

*Huddleston* v. *Dwyer*, 322 U. S. 232 (1943) ..... 9

*Hughes* v. *Fetter*, 341 U. S. 609 (1951) ..... 18

*Hutchison* v. *Ross*, 262 N. Y. 381, 187 N. E. 65 (1933) 16

*Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961) ..... 11, 15, 18

*King* v. *Order of United Commercial Travelers of America*, 333 U. S. 153 (1947) ..... 11

*Knobel* v. *Haiti Commerce Co., S. A.*, 89 N. Y. S. 2d 612 (Sup. Ct. N. Y. Co. 1949) ..... 17

*Koster* v. *Lumbermen's Mutual Casualty Co.*, 330 U. S. 518 (1946) ..... 14

*Levy* v. *Pacific Eastern Corp.*, 153 Misc. 488, 275 N. Y. S. 291 (Sup. Ct. N. Y. Co. 1934) ..... 14

*Mansfield Hardwood Lumber Co.* v. *Jackson*, 268 F. 2d 317 (1959), cert. den. 361 U. S. 885, rehearing den. 361 U. S. 926 (1960) ..... 12

*Meredith* v. *Winter Haven*, 320 U. S. 228 (1943) .... 14

*Miller* v. *Quincy*, 179 N. Y. 294, 72 N. E. 116 (1904) 16

PAGE

*Newman* v. *Baldwin*, 13 Misc. 2d 897, 179 N. Y. S. 2d 19 (Sup. Ct. N. Y. Co. 1958) ..... 10

*North* v. *Ringling*, 187 Misc. 621, 63 N. Y. S. 2d 135 (Sup. Ct. N. Y. Co. 1946) ..... 17

*Pomerantz* v. *Clark*, 101 F. Supp. 341 (D. Mass. 1951) ..... 17, 18

*Ragan* v. *Merchants Transfer and Warehouse Co.*, 337 U. S. 530 (1948) ..... 9

*Sher* v. *Tilles*, 8 Misc. 2d 253, 166 N. Y. S. 2d 794 (Sup. Ct. Nassau Co. 1957) ..... 17

*State ex rel. Weede* v. *Iowa Southern Utilities Co.*, 231 Iowa 784, 2 N. W. 2d 372 (1942) ..... 14

*Tarlow* v. *Archbell*, 47 N. Y. S. 2d 3 (Sup. Ct. N. Y. Co. 1943), aff'd 296 N. Y. 757, 70 N. E. 2d 556 (1946) ..... 17

*Weinstein* v. *Aeolian Co.*, 243 App. Div. 355, 277 N. Y. S. 230 (2d Dept. 1935) ..... 16

*West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223 (1940) ..... 14

*Williams* v. *Green Bay & Western R. Co.*, 326 U. S. 549 (1946) ..... 14

*Woods* v. *Lancet*, 303 N. Y. 349, 102 N. E. 2d 691 (1951) ..... 17

STATUTES:

New York Business Corporation Law §§1317-20 ... 15, 16

Title 28 United State Code §1254(1) ..... 2

PAGE

TREATISES AND OTHER REFERENCES:

Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L. J. 267 (1946) ..... 18

Corbin, *The Laws of the Several States*, 50 Yale L. J. 762 (1941) ..... 14

2 Hornstein, *Corporation Law and Practice* (1959), pp. 83-4 ..... 14

Latty, *Pseudo-Foreign Corporations*, 65 Yale L. J. 137 (1955) ..... 14

Note, 33 Columb. L. Rev. 492 (1933) ..... 14

Note, 44 Harvard L. Rev. 437 (1931) ..... 14

Reese and Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Columb. L. Rev. 1118 (1958) 13

Restatement, *Conflict of Laws* (1934) ..... 8, 15

Restatement, *Conflict of Laws* (1934), §332 ..... 15

Restatement Second, *Conflict of Laws, Tentative Draft No. 6* (1960) ..... 15

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Nathan Hausman, Joseph Applebaum, The Applebaum Foundation, Inc., Alfred N. Barnett, Julie A. Buckley, as remaining trustee u/w of Daniel Buckley, deceased, Peter Fundaro, Harold Maltz, Norvin H. Rieser, Fred Weibert and Regina Weibert and L. H. Luckett pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on February 13, 1962.

### Opinions Below

The opinion of the Court of Appeals, printed in Appendix A, *infra*, has not yet been reported. The opinion

of the District Court dated June 27, 1960 is unreported and is printed at p. 12a of the Appendix to petitioners' brief as appellants in the court below.

Earlier opinions of the District Court, having a bearing on this petition, dated September 9, 1958 and November 26, 1958, are printed at pp. 60a and 63a of said Appendix to petitioners' brief below. The opinion dated September 9, 1958 is reported in 22 FRD 304, and the opinion dated November 26, 1958 is unreported.

## Jurisdiction

The judgment of the court below was dated and entered on February 13, 1962. The jurisdiction of this Court is invoked pursuant to Title 28 United States Code §1254(1).

## Questions Presented

The questions presented arise from the dismissal of this diversity suit, a minority shareholders' derivative action, on the sole ground that the law of Venezuela, the nation of incorporation, allows only a "majority shareholders' action".

The first question forming the basis for this petition is whether, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the court below properly found that the New York courts would apply the law of Venezuela in bar of the action, state law being silent on the law to be applied in case of a conflict of laws as to the existence of a remedy for minority shareholders. The answer depends on these subsidiary questions, involving the method and technique of ascertaining state law on a novel issue of vital importance to the rapidly growing body of American investors in shares of corporations chartered in foreign countries:

1. Did the court below fail to follow controlling decisions of this Court in its explicit refusal to function in the manner of a state court of last resort?

2. Did the court below profess to follow a "clearly enunciated state rule"[1] of mechanical referral to the law of the nation of incorporation, where no such rule in fact exists?

3. Did the court below, in selecting Venezuelan law, properly disregard, under New York law, the overwhelming local interest exemplified by the American citizenship of 50,000 of the corporation's shareholders, including plaintiffs, and of the adversary defendants; the corporation's American financing and the long trading of its shares on an American exchange; and the likely commission in the United States of the serious and continuing wrongs complained of?

4. Did the court below properly conclude that New York, a pioneer in the grouping of contacts theory of resolving conflicts of law, would eschew that approach in favor of the doctrine of mechanical referral to the law of the place of incorporation as indicated principally by dicta in old cases long antedating New York's adoption of the contacts theory?

5. Did the court below properly exclude from its "data" in ascertaining state law a new state enactment which completely departs from referral to the law of the place of incorporation with regard to shareholders' suits in behalf of so-called domiciled foreign corporations?

6. Did the court below properly find that New York would not reject Venezuelan law as repugnant to local public policy, notwithstanding that the record shows

[1] Appendix A, *infra*, p. 37.

that Venezuela deliberately throttles minority shareholders and leaves them without any practical remedy against managerial fraud?

7. Did the court below properly find that New York would regard the issue of the maintainability of this action by minority shareholders as one of substance rather than one of procedure to be governed by local law?

The second question forming the basis for the petition is the following:

Does comity require recognition of the code of a foreign nation when so doing will strip American investors of all protection afforded by state and federal decisional and statutory law, and convert a foreign charter into a license for plunder?

Petitioners will also raise the following question if the petition is granted:

Under the law of New York is the Venezuelan law defense available to the adversary defendants; and should the corporation be allowed to assert that defense, in bar of its own recovery, in a pleading interposed by attorneys who also represented one of the adversary defendants and who have a personal interest in the outcome?

## Statement of the Case

The suit was commenced on April 18, 1957 in the United States District Court for the Southern District of New York. The basis for federal jurisdiction in the court of first instance was diversity of citizenship (66a, 71a, 74a).[2]

[2] Numerals in parentheses refer to the Appendix to petitioners' brief as appellants in the court below.

Plaintiffs-petitioners are stockholders of defendant-respondent Pantepec Oil Company, C.A., a Venezuelan corporation; and they sue derivatively for its benefit (66a). The other parties are defendants-respondents John W. Buckley and The Catawba Corporation. All the plaintiffs and Buckley are citizens of the United States. Catawba is a Delaware corporation qualified to transact business in New York (30a).

Pantepec is American-financed and American-dominated (26a, 31a, 74a-76a). By virtue of an agreement with a New York depositary made in 1938 (31a), Pantepec's bearer shares, evidenced by "American Depositary Receipts", have long traded on the New York Curb and American Stock Exchanges in New York City (26a). The deposit agreement provides (58a):

> "27. All questions concerning the interpretation, validity and effect of this Agreement or of the certificates hereunder shall be determined according to the laws of the State of New York."

Aided by the deposit agreement, Pantepec's management, which includes defendant-respondent Buckley, regularly solicits proxies, in the manner of American corporations, for shareholders' meetings held in Venezuela (44a, 114a). Meetings are attended by few, if any, shareholders not associated with the long-entrenched management of the corporation (80a).

Pantepec has 3,133,819 shares outstanding with more than 50,000 holders, almost all of whom are American citizens (27a, 80a). Plaintiffs hold some 33,000 shares (2a-4a).

The gist of the complaint before the court below was long continuing extraction of large sums from Pantepec by the dominating Buckley management, mainly through so-

called service contracts with Catawba, a Buckley-owned company (74a-80a).[3] The record (30a) indicates that Catawba's headquarters and the real seat of Pantepec's management, and hence the likely locus of the challenged transactions, were and are in New York City.

The judgment in the court below affirms (so far as appealed from) a judgment of the district court (10a) which, before any trial of or pre-trial inquiry into the facts and matters complained of (5a-6a), dismissed the action upon the sole ground that no such remedy as a minority shareholder's suit is available under the law of Venezuela, the chartering nation (12a-24a).

Under Venezuelan law a corporate claim against directors, officers and third parties is "vested" solely in the stockholders' meeting (188a, 19a). No claim can be prosecuted on the corporation's behalf except at the direction of the meeting (19a-20a). Thus the wrongdoers, if effectively in control of management and, thereby of the shareholders' meetings, as alleged here (74a-80a), can mulct the corporation with impunity (163a-164a, 192a).

Minority shareholders are further frustrated by the requirement that stockholders' complaints be channeled to the meeting through an individual, elected by the stockholders, called the *comisario* (186a, 188a). Only if the complaint is by holders of 10% or more of the outstanding stock does the *comisario* have to report to the meeting the facts complained of, as distinguished from mere receipt of the complaint (188a, 21a-22a). The stockholders' meeting has

[3] I.e., the third of the three counts comprising the third amended complaint (66a-82a). Petitioners did not appeal dismissal of the first count (12a), and their main brief in the court below (pp. 15-16) expressly limited their second count appeal to those certain allegations thereof whose dismissal might be deemed dispositive of a particular claim asserted in the third count (viz., paragraph 43 (77a-78a)).

the final say and is the last resort, the only appeal being to another stockholders' meeting (162a).[1] Stockholders' meetings must be held in Venezuela (165a).

Mustering the holders of 10% of stock necessary to have the facts of a complaint placed before a stockholders' meeting is practically foreclosed by other oppressive features of Venezuelan law. Complaining holders must physically deposit their shares with the *comisario* or his designee until the meeting is held (189a, 156a-157a). Moreover, shareholders are entitled to examine the stockholders' list only during the fifteen-day period immediately prior to the meeting (186a, 21a-23a), and even this privilege is meaningless as to companies like Pantepec whose shares are in bearer form (31a).

The Venezuelan Commercial Code from which the foregoing derives is based upon the Italian Commercial Code of 1882 (190a, 191a, 21a). Although the Italian Code relative to corporations was modified some years ago, the basic articles relative to corporations in the Venezuelan Code remain unchanged (190a). They hark back to a primitive economic era in which corporations typically had a dozen shareholders and it was calculated policy, which Venezuela still has not seen occasion to rectify, to deny small shareholders a remedy for corporate abuse (158a-159a).

Corporate litigation is rare in Venezuela (147a). In a legal treatise introduced by the defendants, the rights granted to minority shareholders by the Venezuelan Code are characterized as "futile" and "theoretical" (192a). The trial judge himself stated that it was established that plaintiffs have no remedy under the law of Venezuela (153a).

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[1] The limit of judicial power is to order the call of another stockholders' meeting (187a-188a, 21a-22a). Even this remedy is confined to (1) complaints of 20% or more of stockholders, or (2) complaints concerned solely with illegal action taken at a stockholders' meeting within the past fifteen days (*id.*).

The lengthy opinion in the court below (App. A, *infra*) makes no reference whatever to the overwhelming American interest in the controversy. For aught that therein appears, the locus of all parties concerned and of the transactions and subject matter in dispute could be Venezuela. Rejecting the grouping of contacts approach of *Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 2d 99 (1954), and its numerous progeny, and ignoring the progressively protective trend of state and federal decisional and statute law in related areas, the court below found Venezuelan law to be mandated under the "internal affairs" rule gleaned from one lower court decision, old dicta and the Restatement, *Conflict of Laws*, issued in the year 1934. Characterizing the pertinent policy of Venezuela as one "which, in effect, allows only majority stockholder actions" (App. A, *infra*, p. 37), the court below found no inconsistency with that of New York; and, further, that New York would regard Venezuela's conditions for suit as a matter of substance rather than of local procedure or remedy.

If certiorari be granted petitioners will also question the affirmance by the court below of the denial of their motion to strike the Venezuelan law defenses of respondents Buckley and Catawba, and to strike Pantepec's answer and the appearance on its behalf by its present attorneys, with leave for it to replead through independent counsel. This subject is the first dealt with in the opinion below (App. A, *infra*, pp. 25-8).

The rulings sought to be reviewed leave petitioners and other shareholders wholly without remedy for respondents' allegedly continuing self-dealing and wrongdoing.

## Reasons for Granting the Writ

### I.

We are keenly aware that this Court is disinclined to disturb the finding of a court of appeals as to state law. *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1943); *Ragan* v. *Merchants Transfer and Warehouse Co.*, 337 U. S. 530, 534 (1948). We urge this case as an exception because (1) the Court of Appeals' finding of "a clearly enunciated state rule" (App. A, *infra*, p. 37) is demonstrably unsupportable; (2) in actuality, the issue of state law is of first impression and of far-reaching importance not only to the numerous shareholders of the corporation here involved but to many other American shareholders who are sure one day, if not already, to be similarly situated; (3) premised upon its fallacious finding of "a clearly enunciated state rule", the Court of Appeals deliberately and avowedly refused to pass upon the relative merits of the doctrines competing for adoption before it and expressly declared that "It is certainly not our function to apply the rule we think better or wiser" nor to be "formulating the legal policy and mind of the state" (App. A, *infra*, p. 37); (4) the Court of Appeals' rationale invites use of a foreign charter to plunder American investors and to evade the whole body of protective state and federal case and statute law; and (5) the particular issue of state law is far more likely to arise in diversity cases in the federal court than in New York or other state courts and if not reviewed by this Court it may be years before the rule adopted below is successfully challenged.

The keystone of the opinion below is the conclusion, under the heading "Internal Affairs Rule", that courts generally, and New York courts in particular, refer questions involving a shareholder's right and standing to remedy corpo-

rate fraud and mismanagement to the law of the state of incorporation. Among the New York decisions cited in this section of the opinion, however, only two present any issue involving fulfillment of conditions for maintaining a suit of this nature imposed by the chartering state. All the other New York decisions, most of them of considerable age, are cited presumably either for their dicta respecting the general application of domiciliary corporate law or simply as instances, without other relevancy, of corporate litigation where domiciliary law was applied.

The two cited cases which involved conditions of suit are *Hirshhorn* v. *Hirshhorn*, 280 App. Div. 791, 112 N. Y. S. 2d 841 (2d Dept. 1952), and *Newman* v. *Baldwin*, 13 Misc. 2d 897, 179 N. Y. S. 2d 19 (Sup. Ct. N. Y. Co. 1958).

*Hirshhorn* points away from, rather than toward, the conclusion below. A majority of the court therein found it unnecessary, because of inadequate proof of the foreign law, to decide whether a non-record stockholder's right to sue in behalf of a Canadian corporation should be determined by New York or Canadian law. One justice, concurring only in the result, however, was of the opinion that New York law applied, inasmuch as the corporation was engaged in business, and the acts took place and the adversary defendant resided, in New York.

*Newman* involved the maintainability of a derivative action in the absence of a prior demand on shareholders. It was stated that this issue was controlled by the law of Delaware, the state of incorporation which (like New York[3]) dispenses with any such demand. *Newman* was decided by Justice Owen McGivern, one of 148 *nisi prius* judges, while sitting in one of the 62 counties comprising the 10 judicial districts of the state. Decisions by New York Supreme

[3] See *Gottesman* v. *General Motors Corp.*, 268 F. 2d 194, 197-8 (2 Cir. 1959), and cases therein cited.

Court justices are in no way binding on one another (*In re Hawley's Will*; 6 Misc. 2d 927, 930, 163 N. Y. S. 2d 701, 705 (Surr. Ct. Kings Co. 1957)), and they have no force as precedents in the state Appellate Divisions and the Court of Appeals. In presenting the *Newman* case as its prime authority, the court below (App. A, *infra*, pp. 32-3) seems to have overlooked *King v. Order of United Commercial Travelers of America*, 333 U. S. 153, 161 (1947). If we correctly equate the *Newman* decision with the ruling by the South Carolina Court of Common Pleas before this Court in the *King* case, the Court of Appeals' heavy reliance on *Newman* is so seriously misplaced as to invalidate its entire solution of the state law problem.

It was petitioners' position in the courts below that the problem of state law here presented is one of first impression throughout the American jurisdictions. We contended primarily (1) for application of the grouping of contacts theory of *Auten v. Auten*, 308 N. Y. 155, 124 N. E. 2d 99 (1954), and, (2) in any event, for rejection of the Venezuelan law as repugnant to the public policy of the state. Petitioners also urged that under New York choice of law rules, especially as recently exemplified by *Kilberg v. Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), the Venezuelan pre-conditions of suit should be treated as procedural and hence as not binding on the forum.

Respondents for the most part relied upon the aforementioned "internal affairs" cases cited in the opinion below.

In earlier proceedings in this case, District Judge Sugarman adopted the *Auten* doctrine without reference to the "internal affairs" rule (61a, reported 22 FRD 304); and this view was implicitly endorsed in a later ruling herein by Chief District Judge Ryan (65a). These opinions were confirmed, it seemed, by the Fifth Circuit's carefully rea-

soned adoption of the grouping of contacts theory in *Mansfield Hardwood Lumber Co.* v. *Jackson*, 268 F. 2d 317, 320-1 (1959), cert. den. 361 U. S. 885, rehearing den. 361 U. S. 926 (1960), a representative shareholders' action which would have been defeated by application of the substantive law of the state of incorporation. Even Judge MacMahon, who made the ultimate determination herein in the court of first instance, paid obeisance to the *Auten* doctrine in his opinion of June 27, 1960, although inexplicably writing that "Venezuela is the place having the most significant contacts with the subject matter and transactions in dispute" (13a).[6]

It is our basic submission on this petition that, in the posture of state law indicated above, the court below gravely misapplied the doctrine of *Erie R. Co.* v. *Tompkins* (1) by professing to discover "a clearly enunciated state rule" where in fact there is none, and (2) by deliberately refusing on that premise to fulfill its role as the counterpart of the state court of last resort.[7] Its failure to function like a state court of last resort appears in the following passage of its opinion rejecting the grouping of contacts principle (App. A, *infra*, pp. 36-7):

> "Appellants have brought to our attention a number of cases in which this Court, in order to resolve 'com-

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[6] This was the third and final District Court opinion on choice of law. The only Venezuelan contacts then and now presented by petitioners' third count (74a-80a), which was their sole concern in the court below (footnote 3, *supra*), are Pantepec's place of incorporation; the location of Pantepec's shareholders' meetings; and the location of oil concessions once owned by Pantepec, to the limited extent that their sale was the supposed basis for the fees, etc. which are the subject of one particular claim (77a-78a [par. 43]). The facts thus far adduced which reflect the overwhelming American interest are summarized on pp. 5-6, *supra*.

[7] It may be worth noting that, of the bench below, only Judge Kaufman has extensive training and experience in New York law. Judge Waterman is a Vermont lawyer; and Judge Marshall, recently designated, has been active in an entirely unrelated field.

mercial' controversies, referred to the Auten rule. But all of these cases involved questions concerning the law governing contracts or liability for torts. None of them directly or indirectly suggests that this Court was of the opinion that New York tribunals have introduced the Auten rule into corporate stockholder litigation. And appellants have not cited any decisions by New York courts in which this has been done. We do not wish to be understood as intimating in any way that the Auten rule could or could not be applied profitably to some corporate questions. Nor do we pass judgment upon the relative merits of the 'internal affairs' doctrine, vis-a-vis the Auten rule except to note our disagreement with appellants' suggestion that the 'internal affairs' doctrine has no application to the branch of the law with which we are dealing, or that it clearly serves no useful purpose at all. We think it is generally agreed that, in fact, 'the values of predictability and ease of application are best served by this rule.' Reese and Kaufman, supra, at p. 1144 [of 58 Columb. L. Rev.].[8]

In any event, the proper function of this Court is to ascertain what New York law is, and not to speculate about what it will be, or in Learned Hand's felicitous phrase, 'to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.' Spector Motor Service v. Walsh, 139 F. 2d 809, 823 (2nd Cir. 1943)

[8] The article referred to expressly confines itself to corporations doing business in two or more states in this country (pp. 1118, 1126, 1143). It urges application by a second state of the law of the state of incorporation on a highly selective basis—mainly in controversies where uniform treatment of shareholders is obviously desirable. Examples are questions as to legality of dividends, validity of proxies and extent of shareholders' liability. Minority shareholders' suits are in no way mentioned.

(dissent), vacated 323 U. S. 101 (1944). It is certainly not our function to apply the rule we think better or wiser. Klaxon Co. v. Stentor Electric Mfg. Co., supra, at p. 497. If we were to apply the Auten rule as appellants ask, we would be formulating the legal policy and mind of the state in an area where there would appear to be a clearly enunciated state rule. Yoder v. Nu-Enamel Corp., 117 F. 2d 488, 489 (8th Cir. 1941)." [footnotes omitted]

The "clearly enunciated state rule" adverted to at the conclusion of the quotation is the supposed principle of mechanical referral to the law of the state of incorporation. In view of what precedes that reference, the Court of Appeals, in denying petitioners any day in court, must have deemed inapplicable this Court's admonitions to seek the developing line of authority from all available data. *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223, 237 (1940); *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204-5 (1955); *Meredith* v. *Winter Haven*, 320 U. S. 228, 237-8 (1943); see also Corbin, *The Laws of the Several States*, 50 Yale L. J. 762, 775-6 (1941). Seemingly ignored were these plain portents of New York's preference for the modern grouping of contacts concept over the much-criticized[9] "internal affairs" rubric, especially in this instance where that formula works such a spectacular failure of justice, to absolutely no juridical, constitutional, political or other end or purpose:

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[9] *Koster* v. *Lumbermen's Mutual Casualty Co.*, 330 U.S. 518, 521-2, 526-7 (1946); *Williams* v. *Green Bay & Western R. Co.*, 326 U.S. 549, 553 (1946); *Levy* v. *Pacific-Eastern Corp.*, 153 Misc. 488, 491, 275 N.Y.S. 291, 296-7 (Sup. Ct. N.Y. Co. 1934); *State ex rel. Weede* v. *Iowa Southern Utilities Co.*, 231 Iowa 784, 816-827, 2 N.W. 2d 372, 390-395 (1942); Latty, *Pseudo-Foreign Corporations*, 65 Yale L.J. 137, 144 (1955); 2 Hornstein, *Corporation Law and Practice* (1959), pp. 83-4; Notes, 33 Columb. L. Rev. 492 (1933); 44 Harvard L. Rev. 437, 439 (1931).

1. Leading New York conflict of laws decisions have shown scant regard for the 1934 *Restatement* so heavily relied on in the opinion below. *Auten* v. *Auten*, 308 N. Y. 155, 159-61, 124 N. E. 2d 99, 101-2 (1954), the landmark case, was a flat rejection of the rigid, traditional text of *Restatement, Conflict of Laws*, §332. In *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 49, 172 N. E. 2d 526, 534 (1961), New York rejected another basic *Restatement, Conflict of Laws*, teaching, this time in the field of tort.[10] Actually, far from slavishly following the *Restatement* and older authorities, New York is the innovator and the leader in this branch of law. Tentative Draft No. 6 of *Restatement Second, Conflict of Laws* (1960), the chapter on Contracts, generally adopts New York's now widely accepted approach, in terms of the law of "the state of most significant relationship."

2. In 1961 the New York Legislature enacted the Business Corporation Law, to take effect April 1, 1963, as a recodification and modernization of existing state corporation statutes. The many innovations include, in §1317, the concept of a "domiciled foreign corporation". Such a corporation is defined as one authorized to conduct or actually conducting business in the state with at least two-thirds of its outstanding stock or two-thirds of its voting stock owned by residents of the state, or else with two-thirds of its business or investment income allocable to the state for franchise tax purposes. Such a "domiciled foreign corporation"

[10] In *Huber Baking Co.* v. *Stroehmann Bros. Co.*, 252 F. 2d 945, 951 (2 Cir. 1958), cert. den. 358 U.S. 829, the Second Circuit applied *Auten* as New York doctrine in a trademark infringement and unfair competition suit. In the opinion below (App. A, *infra*, p. 36), the court acknowledges that it has followed *Auten* in tort as well as contract cases.

is subject, under §§1318-20 of the Act, to a number of regulatory provisions applicable to domestic corporations. Under §1318 the directors and officers of such a foreign corporation will be subject to the same liability for misconduct in office as the directors and officers of a domestic corporation; *and such liability will be enforceable and relief will be granted by the New York courts in the same manner as in the case of domestic corporations.* New York is the first of the states to adopt a statutory grouping of corporate contacts for such purposes. In *Hutchison* v. *Ross*, 262 N. Y. 381, 394-5, 187 N. E. 65, 70-1 (1933), the State Court of Appeals found public policy, as expressed in a statute, to outweigh dicta in old cases. The new Business Corporation Law, although prominently urged in petitioners' briefs in the court below, is ignored in its opinion.

3. Nearly sixty years ago, New York refused to apply the "internal affairs" rule where

> "It would necessarily follow . . . that the directors of a foreign corporation transacting business and having its principal office in this state may plunder the corporation with impunity and the courts of this state are without power to redress such wrongs as appear upon the face of the complaint in this case." *Miller* v. *Quincy*, 179 N. Y. 294, 299-300, 72 N. E. 116, 118 (1904).

New York has since consistently held that claims against directors, officers and third parties for mismanagement and fraud do not involve "internal affairs". *Goldstein* v. *Lightner*, 266 App. Div. 357, 42 N. Y. S. 2d 338 (1st Dept. 1943), aff'd 292 N. Y. 670, 56 N. E. 2d 98 (1944); *Weinstein* v. *Aeolian Co.*, 243 App. Div. 355, 277 N. Y. S. 230 (2d Dept. 1935); *Frank*

v. *American Commercial Alcohol Corp.*, 152 Misc. 123, 125-30, 273 N. Y. S. 622, 624-9 (Sup. Ct. N. Y. Co. 1934); *Knobel* v. *Haïti Commerce Co., S. A.*, 89 N. Y. S. 2d 612 (Sup. Ct. N. Y. Co. 1949); *Sher* v. *Tilles*, 8 Misc. 2d 253, 166 N. Y. S. 2d 794 (Sup. Ct. Nassau Co. 1957); *Tarlow* v. *Archbell*, 47 N. Y. S. 2d 3, 7-8 (Sup. Ct. N. Y. Co. 1943), aff'd 296 N. Y. 757, 70 N. E. 2d 556 (1946); *North* v. *Ringling*, 187 Misc. 621, 624-5, 63 N. Y. S. 2d 135, 138-9 (Sup. Ct. N. Y. Co. 1946); *Ackert* v. *Ausman*, 29 Misc. 2d 974, 976-7, 218 N. Y. S. 2d 814, 817-8 (Sup. Ct. N. Y. Co. 1961).

4. Assuming *arguendo* that mechanical referral to domiciliary corporate law has some viability in New York case law, it by no means should be assumed that any such doctrine would be applied in the circumstances of this case. New York is no respecter of precedent where justice demands that a question be re-examined. *Woods* v. *Lancet*, 303 N. Y. 349, 354-5, 102 N. E. 2d 691, 694 (1951) [allowing for the first time a cause of action for pre-natal injuries]. The New York Court of Appeals has announced that a rule should be discarded when found to be "out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing." *Bing* v. *Thunig*, 2 N. Y. 2d 656, 667, 143 N. E. 2d 3, 9 (1957) [abandoning the doctrine of immunity for negligence of hospital employees]. This contrasts, for example, with Massachusetts where "Principles are announced and adhered to in broad magisterial terms [with] emphasis . . . on precedent and adherence to the older ways." Wyzanski, J. in *Pomeryntz* v. *Clark*, 101 F. Supp. 341, 346 (D. Mass. 1951).

As stated in its opinion (App. X, *infra*, pp. 36-7), the court below never tried to estimate the view of the state

court of last resort in terms of the relative merits of the principle of mechanical referral to the law of the state of incorporation vis-à-vis the *Auten* rule, or to apply the rule thought to be better or wiser, or to formulate the legal policy and mind of the state. If this is sound doctrine in these circumstances, *Erie R. Co.* v. *Tompkins* has truly begotten a monstrous offspring and the worst forebodings of the early critics of that decision[11] will, at this late date, have been substantiated.

Much the same has to be said for the lower court's further finding that the Venezuelan law is compatible with New York's public policy. In *Kilberg* v. *Northeast Airlines, Inc.*, *supra*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), the Court of Appeals, *sua sponte*, abandoned the universal rule that the *lex loci delicti* controls the measure of damage, in order to avoid subjecting New York residents to Massachusetts' $15,000 limitation on recovery in wrongful death actions. The policy here involved cuts just as deep. See *Pomerantz* v. *Clark*, *supra*, 101 F. Supp. 341, 346-7 (D. Mass. 1951). We think it apparent that the court that decided *Kilberg* would be appalled by the denial of justice inherent in the decision below.

## II

In *Kilberg* v. *Northeast Airlines, Inc.*, *supra*, 9 N. Y. 2d 34, 51, 172 N. E. 2d 526, 535 (1961), a minority of the court expressed grave doubt as to the constitutionality of the majority view in light of the apparent denial of full faith and credit to the Massachusetts damage limitation, citing *Hughes* v. *Fetter*, 341 U. S. 609 (1951).

The present case presents no such constitutional constraint or problem. Nor is application of the Venezuelan

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[11] E.g., Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie* v. *Tompkins*, 55 Yale L. J. 267, 294-2 (1946).

code suggested, in view of the overwhelming local interest, even by the nebulous doctrine of the comity of nations (*Hilton* v. *Guyot*, 159 U. S. 113, 163-4 (1895)).

The rule announced below undermines, to absolutely no purpose, the whole body of laboriously evolved case and statutory law for the protection of small shareholders, whenever the corporation happens to be chartered in a foreign land with less concern for minority interests. The danger is a real and growing one. Hardly a day passes without the financial journals heralding the arrival of a new foreign issue in the American securities market. The small investor, always ripe for exploitation, is stripped of all protection under the decision below where the chartering nation is one of the many which have yet to cope with the grave abuses which inevitably accompany wide cleavage between the ownership and the control of corporate enterprises.

## CONCLUSION

**For the foregoing reasons, this petition for a writ of certiorari should be granted.**

Dated, New York, N. Y.
March 20, 1962

Respectfully submitted,

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